Submission for the Record

of the Hearing held on June 14, 2011 by the

U.S. House of Representatives, Committee on the Judiciary,

Subcommittee on Crime, Terrorism and Homeland Security

on the subject of

The Foreign Corrupt Practices Act

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Honorable Members of Congress,

It has come to our attention that concerns have been raised by representatives of some members of the business community about the recent increased enforcement by the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") of the Foreign Corrupt Practices Act (the "FCPA"), which has been in force since 1977.

We understand that the Honorable Members are considering whether these concerns are well founded and whether it is appropriate and/or advisable to amend the FCPA to address these concerns.

I. Introduction

There has indeed been a marked increase in FCPA cases in the past few years. The number of prosecutions has increased year on year since 2005 and in 2010 the DOJ and the SEC brought a combined total of 74 cases. We also saw record-breaking fines levied in 2010, with over $1.7 billion being added to U.S. coffers.[1] A large percentage of the cases brought over the past five years have been against non-U.S. persons, demonstrating prosecutors' dedication to leveling the playing field for U.S. companies.

Unlike many U.S. agencies that Members of Congress frequently criticize for their lack of enforcement of U.S. laws, the DOJ and the SEC are finally doing their job to enforce one of the U.S.'s most important exports, our anti-bribery laws. There is no private right of action under the FCPA, meaning that companies harmed by the bribery of another company, for example losing a contract as a result of another company paying a bribe, are unable to bring an action under the FCPA. As a result, the U.S. government has the sole responsibility of enforcing the FCPA to protect the interests of companies that are compliant with the law.

We commend the DOJ and the SEC for their dedication and commitment in this area and encourage Members of Congress to do the same. <u>We urge you to demonstrate your support by rejecting attempts to weaken the FCPA by hampering these agencies' ability to enforce the FCPA.</u>

The claim that the FCPA is one of the U.S.'s most important exports is well-founded. Many international anti-bribery conventions and national laws are based on the FCPA, including the OECD Anti-Bribery Convention,[2] the Inter-American Convention Against Corruption[3] and the African Union Convention on Preventing and Combating Corruption.[4] U.S. officials in the State Department, the DOJ, USAID, the Department of Commerce, the Millennium Challenge Corporation and other U.S. agencies have been working tirelessly to encourage the creation of these international conventions and national laws. Their efforts to get appropriate legal

[1] See Friedman, Paul, Smithline, Ruti and Kleine, Angela. *2010: Another Record-Breaking Year for FCPA Enforcement, Confirming "New Era"*. Jan. 12, 2011, Morrison & Foerster LLP, available at http://www.mofo.com/files/Uploads/Images/110112-FCPA-Enforcement.pdf.

[2] Entered into force in 1999.

[3] Entered into force in 1997.

[4] Entered into force in 2006.

frameworks in place have been successful in many countries, with even China and Russia adopting anti-bribery legislation earlier this year.

Putting anti-bribery laws in place around the globe is the first step toward curtailing worldwide corruption. *The second step is encouraging enforcement.* The DOJ and the SEC are leading by example. They have been prosecuting both U.S. and non-U.S. companies and individuals with increasing frequency and success over the past 10 years, demonstrating that even the largest, most powerful international corporations are not above the law. While concerns raised by some members of the business community demonstrate that this message is being heard by companies, it is also being noticed by governments of other countries and is setting a positive example of the importance of a strong rule of law and a stable, predictable business environment.

II. Why Are We Concerned About Bribery?

It is important to remember why bribery is considered to be bad and why the U.S. is taking significant steps to eradicate it worldwide. There are commercial reasons and there are social reasons, all of which are in some way economic reasons. Some of these are:

Commercial:

- Bribery is economically inefficient because it distorts competition. Companies are no longer competing on the quality of their work or product and its price, but rather on the amount of the bribe they are willing to pay.
- Bribery undermines the rule of law, creating unstable business environments that lead to increased risk which, in turn, increases the cost of procuring capital.
- Bribes themselves create an external costs of doing business that cannot be accurately budgeted, and these days companies engaging in bribery can add the cost of legal defense and penalties, as well as the cost of potential shareholder suits such as the one filed against Hewlett Packard in October 2010.
- Demands for bribes, once indulged in the first instance, only increase over time.

Social:

- When the size of a bribe is the deciding factor in which firm obtains business, the firm hired may not be qualified to do the job, may use substandard materials that, due to additional bribes, may never be inspected, and the resulting work-product may be overpriced, inadequate or even unsafe.
- Bribery can undermine the provision of public services by resulting in inappropriate public policy decisions based on the commercial desires of companies as opposed to the needs of the community.
- The negative effect of bribery on predictability and certainty in the legal system and administrative procedures creates immeasurable monetary and emotional costs in the daily life of people around the world.

Some companies, like Newmont Mining, view the FCPA in a positive light. Newmont Mining, based in Colorado, is the second largest gold mining company in the world. Newmont's Director Corporate & External Affairs for Africa, Chris Andersen, stated during a panel

discussion at the Extractive Industries Transparency Initiative Global Conference in March of this year that,

> "…Newmont's experience, particularly in Africa, has been that FCPA has been an enormously valuable protective device for us…when you have a government person saying…'we'll give you that license if you buy us a car or something'…it's not about look 'I'm a mean guy and I don't value our relationship, and therefore I'm not going to give it to you,' you say 'look, there's a law out there that means I'm going to go to jail if I do that, I'm not going to go to jail for you or anybody else.'"
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> "…And we found it to be like insurance policy, that's a useful external reference that you can use to combat these sorts of things. And Newmont in Ghana has got a reputation of being mean because we don't pay bribes of any kind and everybody now knows it, and we've talked until we're blue in our face the last seven years about FCPA."[5]

Newmont Mining is not complaining about the FCPA; it is promoting it so that it can benefit from a more stable business environment.

III. Why Limiting Corporate Liability under the FCPA is Not Advisable

The FCPA is working. Corporations around the world are concerned about the possibility of prosecution under the Act. Many are changing their behavior as a result. They are teaching their employees what constitutes bribery under the FCPA and they are being vigilant about ensuring they have a comprehensive compliance program in place, with compliance officers often sitting on the boards of companies.

Companies are taking these actions because of the threat of liability under the FCPA. Reducing the scope of potential liability under the FCPA will likely have the effect of also reducing the attention companies pay to their compliance programs. We understand that this argument may be perceived as making good business sense - decreasing operating costs and potential liabilities while allowing a company to try to mitigate the negative external costs of bribery itself through whatever means it chooses. Unfortunately, history has shown that lack of regulation and sanction in this area creates the ideal environment for corruption to flourish. Now is not the time to stymie the consistently increasing pace of progress in the area by crippling the ability of the U.S. Government to enforce the FCPA. We should not be sending a message to countries around the world that we are no longer serious about combating bribery.

The U.S. Chamber Institute for Legal Reform (the "U.S. Chamber") published a document entitled "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act" in October of 2010 and we understand that the U.S. Chamber's proposals will be discussed at today's Hearing. We offer the following brief comments to the U.S. Chamber's arguments for your consideration.

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[5] Statement by Chris Andersen, Director Corporate & External Affairs Africa, Newmont Mining Panel Discussion: New and Emerging Financial Reporting Requirements and the EITI, Extractive Industries Transparency Initiative Global Conference, March 2, 2011, Paris, France. Available at: http://soundcloud.com/eiti/paris2011-en-emerging-reporting-requirements at 20:03 mins.

1. Limiting liability of a parent company for acts of its subsidiaries.

Holding a parent company liable for the acts of its subsidiaries is a central tenet of the FCPA and one of the main reasons that the FCPA is as effective as it is. Corporations create compliance programs that apply to the entire corporate family for both compliance and efficiency reasons. Limiting liability to acts of bribery perpetrated by one entity alone will make it less important for a company to review shortcomings of its global compliance program and make changes necessary to ensure future compliance. That potential for liability at the parent level is the "stick" necessary to ensure that group-level compliance programs are strong and remain so.

2. Defining "foreign official".

The U.S. Chamber is promoting the creation of a definition of "foreign official" so that companies have greater legal certainty. Greater certainty of what? Greater certainty of who they are permitted to bribe and who they are not permitted to bribe. Many companies have adopted a "no bribery of any kind" compliance policy because they cannot be entirely sure who is a foreign official and who is not and, for that matter, what constitutes a facilitation payment and what does not. The UN Convention Against Corruption,[6] which the U.S. ratified in 2006, calls for the criminalization of all forms of commercial bribery, not just bribery of foreign officials, which means that the distinction should be irrelevant. In short, defining the term "foreign official" would underscore the idea that it is perfectly fine to bribe certain people and not others, a principle the United States surely does not want to promulgate. If amendment is to be made to the definition of "foreign official", the concept should actually be deleted in its entirety. Instead, all forms of commercial bribery should be criminalized, in line with our obligations under the UN Convention Against Corruption and as the United Kingdom has done in the Bribery Act.

3. Allowing companies with compliance programs to escape liability (compliance as an affirmative defense).

If a company is found to be in violation of the FCPA, then the existence of a company's compliance program must not have prevented the act(s) of bribery. So why should the existence of their compliance program be a defense to the charge of bribery? The existence and strength of a company's compliance program is currently taken into consideration during the sentencing phase, not when determining guilt or innocence, as is appropriate. Did the bribery take place? Yes – guilty as charged. Did the company have a strong compliance program in place to try to prevent acts of bribery? If the answer is "yes" then the company should receive a reduced sentence. If the answer is "no" then the company should receive a more punitive sentence. "We tried" should not eliminate all possibility of enforcement.

4. Limiting the liability of a successor company for the prior acts of a company that has merged into it or that it has acquired.

By creating an exception that would limit the liability of a successor company, we would in essence be encouraging companies that have engaged in bribery to simply create a new entity with a different name to acquire the company that committed bribery, thus avoiding liability. If

[6] Entered into force in 2005.

this exception is created, lawyers will find creative ways to "erase" liability through clever corporate combinations. It is important to add that in no event should personal liability for acts of bribery be limited pursuant to a merger or acquisition; in those situations the perpetrator had full knowledge of the act of bribery before, during and after the merger or acquisition.

5. Adding a "willfulness" requirement for corporate criminal liability.

The U.S. Chamber states that not including a "willfulness" requirement for corporate criminal liability "substantially extends the scope of corporate criminal liability – as opposed to individual liability – since it means that a company can face criminal penalties for a violation of the FCPA even if it (and its employees) did not know that its conduct was unlawful or even wrong." For an employee to be charged under the statute, the act of bribery has to be a "willful" act.

That makes sense.

There are two scenarios at issue. The first scenario is where a company has an effective enough compliance program in place that the employee knows what a bribe is and that it is illegal and yet the employee pays a bribe anyway. The second scenario is where a company does not have an effective enough compliance program in place and therefore the employee does not know what constitutes a bribe under the FCPA and that it is illegal and he pays the bribe.

Under the first scenario, the employee should be liable because he knew he should not be bribing but did so anyway. The company should be liable because while its compliance program was effective enough to teach its employees what he needed to know, it failed in some other respect. For example, the company may have had lax oversight, a lack of adequate sanctioning mechanisms, no program in place to guide an employee struggling with what to do when actually faced with a bribe request, or any number of possible shortcomings.

Under the second scenario, the company failed to adequately instruct its employee and the employee did not know he was doing something wrong. It is the responsibility of the company to understand and comply with its obligations under the FCPA, a significant part of which is instructing its employees on compliance. It clearly failed to do so and should be liable under the FCPA, but the employee should not suffer for the company's failures.

Implementing the U.S. Chamber's proposal would hand a "get out of jail free" card to companies that choose to ignore their legal obligations under the FCPA.

IV. Why Haven't You Been Hearing More From Civil Society on this Topic?

Members of Congress may be wondering why they have only been hearing from businesses and U.S. Government agencies, particularly the DOJ, on this important topic. It is important to remember that it has been many years since anyone has proposed amending the FCPA. As a result, those who know the FCPA well these days generally represent one of three groups: (i) government enforcement (remember, there is no private right of action under the FCPA, the government is responsible for all enforcement of the Act), (ii) legal practitioners advising corporations on FCPA compliance and defense, and (iii) corporations.

Civil society organizations all over the world do care about the FCPA and its effects, but civil society organizations are generally non-profit organizations that are often funded on a project-by-project or topic-by-topic basis and their staff are hired to work on those specific projects or topic areas, in accordance with their obligations under their funding contracts. The FCPA has not been a topic that most organizations have felt the need to address over the past several years because the statute has been firmly in place and enforcement has been increasing.

Information about the recent attention being paid to the FCPA is being circulated and civil society organizations are working to once again allocate time and resources to this issue. We urge you to listen to civil society organizations as and when they are able to reach out to you on this subject and to refrain from taking any action to amend the FCPA until you have heard from a more sizeable contingent of civil society organizations.

V. Conclusion

The U.S. has shown the world that we are serious about combating bribery through strong enforcement of the FCPA, and the world is following our lead. Weakening the FCPA now will send a message to the world that the U.S. is soft on corruption and our companies are deep pockets for bribe-seekers. The U.S. must focus on encouraging worldwide enforcement and not on crippling a statute that has been the model for international anti-bribery legislation.

We greatly appreciate your attention to our submission and encourage you to contact us should you have any questions.

Respectfully,

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Global Financial Integrity

Global Financial Integrity (GFI) is a Program of the Center for International Policy, a 501(c)3 organization. GFI promotes national and multilateral policies, safeguards, and agreements aimed at curtailing the cross-border flow of illegal money in order to decrease the flight of capital out of developing countries. It is leading the way in efforts to curtail illicit financial flows and enhance global development and security by conducting groundbreaking research, facilitating strategic partnerships and identifying solutions.

Please visit GFI at www.gfip.org and the Task Force on Financial Integrity and Economic Development at http://www.financialtaskforce.org/.